Aspac Lubricants (M) Sdn Bhd (formerly known as Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–293 OF 1996

GOPAL SRI RAM, JAMES FOONG AND ZULKEFLI JJCA

19 JULY 2007

Contract Law — Consideration — Promotional items — Whether promotional item given with purchase could constitute consideration — Whether usefulness of said item a relevant factor to be considered

Contract Law — Consideration — Whether a practical advantage a good consideration

Revenue Law — Income tax — Deduction — Expenses incurred for promotional items deducted from gross income — 'Basket provision' — Whether said provision applicable to promotional items — Income Tax Act 1967 s 33(1)

Revenue Law — Income tax — Entertainment expenses — Promotional items — Whether promotional items were used in production of gross income or were part of entertainment expenses — Income Tax Act 1967 ss 33(1), 39(1)(l)

The appellant is a company that sells lubricants among other things. For the years of revenue assessment from 1989 to 1992, the appellant gave promotional items to its dealers and customers. The items given to the dealers did not bear the appellant logo. The items given to the customers were mugs, 'T' shirts and umbrellas which carried the appellant's logo. The expenses incurred on the promotional items for the customers were deducted from the appellant's gross income for the years of assessment in question. There was no dispute over the dealers' items as the appellant did not dispute the decision by the respondent. The issue relating to the customers items was whether the expenses relating to these items were tax deductible as having been incurred in the production of gross income or whether the said expenses were spent on entertainment and were therefore not tax deductible. The appellant relied on the 'basket provision' that is, s 33(1) of the Income Tax Act 1967 where all outgoings and expenses exclusively incurred in the production of gross income are tax deductible. The appellant also argued on the premise that the customers' items were a consideration in law and therefore part of a bargain which was to realize the sole purpose of business promotion. The respondent argued its case relying on s 39(1)(l) of the said Act which disallows entertainment expenses from being deducted from gross income when ascertaining the adjusted income of a person.

Held, allowing the appeal:

(1) The expenses incurred in respect of the customers' items did not amount to entertainment under s 39(1)(l) as entertaining involves an element of hospitality or charity.(see para 6); *Bentleys, Stokes and Lowless v Beeson* [1952] 2 All ER 82 followed.

(2) In the present case the appellant incurred the expenses relating to the promotional items solely for the promotion of its business (see para 7).

(3) The appellant's other ground of argument that the customers' items were a consideration in law and therefore part of a bargain went towards the argument that the bargains were made by the appellant solely for the purpose of business. It is irrelevant that the customer does not like the promotional item or that it is of no value to the customer. It is still valid consideration. These bargains were accepted by the court as falling within the 'basket provision' in s 33 of the Act (see paras 2 & 8).

(4) The receipt of a customers' item by a customer who purchases the appellant's product confers on the purchaser a 'practical advantage' which also amounts to good consideration in law and has the effect of bringing the customers' item within bargains made by the appellant solely for the purpose of business promotion (see paras 10–12).

[Bahasa Malaysia summary

Perayu merupakan sebuah syarikat yang menjual pelincir antar lainnya. Untuk taksiran hasil daripada tahun 1989 hingga 1992, perayu telah memberikan barangan promosi kepada peniaga dan pelanggannya. Barangan yang diberikan kepada peniaga tersebut tidak mempunyai logo perayu. Barangan yang diberikan kepada pelanggan adalah koleh, kemeja 'T' dan payung yang mempunyai logo perayu. Perbelanjaan yang ditanggung untuk barangan promosi kepada pelanggan telah dipotong daripada pendapatan kasar perayu untuk tahun taksiran yang dipersoalkan. Tiada pertikaian tentang barangan peniaga kepada perayua tidak mempertikaikan keputusan oleh responden. Persoalan berkaitan barangan pelanggan adalah sama ada perbelanjaan berkaitan barangan tersebut yang boleh mendapat potongan cukai kerana telah ditanggung dalam pengeluaran pendapatan kasar atau sama ada perbelanjaan tersebut dibayar untuk hiburan dan oleh itu tidak boleh mendapat potongan cukai. Perayu telah bergantung kepada 'basket provision' iaitu, s 33(1) Akta Cukai Pendapatan 1967 di mana segala wang keluar dan perbelanjaan secara eksklusifnya ditanggung dalam pengeluaran pendapatan kasar boleh dipotong cukai. Perayu juga berhujah berdasarkan premis bahawa pelanggan-pelanggan berhujah kes mereka bergantung kepada s 39(1)(l) Akta tersebut yang tidak membenarkan perbelanjaan hiburan dipotong daripada pendapatan kasar apabila menentukan pendapatan seseorang yang telah diselaraskan.

Diputuskan, membenarkan rayuan tersebut:

(1) Jumlah perbelanjaan berkaitan barangan pelanggan tidak termasuk untuk

hiburan di bawah s 39(1)(l) kerana hiburan melibatkan elemen layanan baik atau amal jariah (lihat perenggan 6); *Bentlys, Stokes and Lowless v Beeson* [1952] 2 All ER 82 diikut.

(2) Dalam kes ini, perayu telah membuat perbelanjaan berkaitan barangan promosi semata-mata untuk promosi perniagaannya (lihat perenggan 7).

(3) Alasan lain dalam hujah perayu bahawa barangan pelanggan tersebut merupakan balasan dari segi undang-undang dan oleh itu sebahagian daripada satu tawaran membawa kepada hujah bahawa tawaran sedemikian dibuat oleh perayu semata-mata bagi tujuan perniagaan. Adalah tidak relevan jika pelanggan tidak menyukai barangan promosi atau ianya tiada nilai kepadanya. Ia masih satu balasan yang sah. Tawaran tersebut diterima oleh mahkamah dan terangkum dalam 'basket provision' dalam s 22 Akta (lihat perenggan 2 & 8).

(4) Penerimaan barangan pelanggan oleh seorang pelanggan yang membeli produk perayu memberikan pembeli satu 'practical advantage' yang juga membentuk balasan yang baik di sisi undang-undang dan mempunyai kesan merangkumi barangan pelanggan itu sebagai tawaran yang dibuat oleh perayu semata-mata bagi tujuan promosi perniagaan (lihat perenggan 10–12).]

Notes

For a case on entertainment expenses, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2353.

For cases on promotional items as consideration, generally see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3021–3083.

For cases on tax deduction, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2294–2334.

Cases referred to

Adams & Brownsword 53 MLR 536 (refd)
Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2) [1990] 2 Lloyds LR 526 (refd)
Andrew Phang 107 LQR 21 (refd)
Bentlys, Stokes and Lowless v Beeson [1952] 2 All ER 82 (folld)
Chappell & Co Ltd v Nestle Co Ltd & Anor [1960] AC 87 (refd)
Chen-Wishart 14 NZULR 270 (refd)
Hird & Blair [1996] JBL 254 (refd)
Lee v GEC Plessey Telecommunication (1993) IRLR 383 (refd)
Mamor Sendirian Berhad v Director General of Inland Revenue [1986] 1 MLJ 1 (refd)
Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723 (refd)
Silver v Dome Resources NL (2007) NSWSC 455 (refd)
Williams v Roffey Bros & Nichols (Contractors) Ltd [1991] 1 QB 1 (refd)

Legislation referred to

Income Tax Act 1967 ss 33(1), 39(1)(l)

Appeal from: No R2–14–5 of 1996 (High Court (Appellate and Special Powers Division), Kuala Lumpur)

Anand Raj (Irene Yong and Luke Wang with him) (Shearn Delamore) for the appellant.
Abu Tariq Jamaluddin (Hazlina Hussain with him) (Legal Officer, Inland Revenue Board) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The appellant is a private limited company. It blends and sells lubricants for motorised vehicles. It also sells some equipment and other products. During the years of revenue assessment 1989, 1990, 1991 and 1992 the appellant gave away certain promotional items to its customers and dealers. There were two categories of promotional items. First, those given to dealers ('the dealers' items') who marketed the appellant's products to members of the public. These did not carry the appellant's logo on them. They were such items as electrical appliances and beverages. Nothing turns on the dealers' items as the appellant taxpayer does not challenge the decision by Revenue in respect of these. Second, those given away to customers ('the customers' items') who purchased the appellant's products. These included such items as mugs, 'T' shirts and umbrellas which carried the appellant's logo. So, if you went along to a petrol kiosk and bought one of the appellant's products, say, a can of 'Castrol' engine oil, for your motor car, you would receive one of the customers' items. The appellant deducted the expenses incurred on all these promotional items from its gross income for each year of assessment because — and this is the nub of the appellant's case — it took the view that these were expenses wholly and exclusively incurred in the production of its gross income. Revenue, after initially allowing these deductions, declined to permit them because — and this is the nub of Revenue's case — they were entertainment expenses and hence liable to be taxed without the benefit of any deduction. Both the Commissioners and the High Court found for Revenue. The appellant has now appealed to us.

[2] The appellant relies on what is commonly referred to as 'the basket provision' to support its deduction of the expenses in question. This is in fact the opening paragraph of s 33(1) of the Income Tax Act 1967 ('the Act') which reads as follows:

> Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period *all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source*…

I have lent emphasis to that part of the subsection on which the appellant relies.

[3] In support of its case to justify the taxability of the expenses in question, Revenue relies on s 39(1)(l) of the Act which was introduced by the by the Finance Act 1995 by way of amendment with effect from the year of assessment 1995. That provision reads:

> 39(1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of —

A (a)–(k)

(l) any expenses incurred in the provision of entertainment including any sums paid to an employee of that person for the purpose of defraying expenses incurred by that employee in the provision of entertainment

B **[4]** The issue before the Commissioners and the court below was this. Were the monies incurred by the appellant taxpayer in providing the customers items — to quote the words of the Act — expenses wholly and exclusively incurred during that period by that person in the production of gross income? Or were they 'expenses incurred in the provision of entertainment' as contended by Revenue. If the former, C then the appellant would be entitled to deduct them: if the latter it would not. Upon this rather simple question we were regaled with authorities which, in my view, did not assist in the resolution of the question.

D **[5]** Before I embark upon a discussion of the issue at hand, let me re-state what the leading authorities have said is the role of a court in a tax appeal by way of case stated. I will simply call it a tax appeal. Such a proceeding is not an appeal in the ordinary sense known to the law. In an ordinary appeal, an appellate court is entitled to interfere with findings of fact if there has been insufficient or no judicial appreciation of the evidence. In a tax appeal we the courts are bound by the findings of fact made E by the Commissioners. And the drawing of inferences by the commissioners is beyond review by a court "unless it is such as no reasonable body of Commissioners, correctly directing themselves in law, could properly have drawn …' (*Mamor Sendirian Berhad v Director General of Inland Revenue* [1986] 1 MLJ 1, per Lord Keith of Kinkel). But we have the final say on questions of law.

F **[6]** Turning now to this appeal, I think that the proper approach in determining whether the expenses in respect of the customers' items were incurred in the production of income, is to examine the true nature of the transaction between the appellant and its customers. In my judgment the expenses incurred in respect of the customers' items did not amount to entertainment within s 39(1)(l). In arriving at G my conclusion on this point, I find it unnecessary to go further than Romer LJ's judgment in *Bentleys, Stokes & Lowless v Beeson* [1952] 2 All ER 82 where he said this:

> Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involves inevitably H supporting that exhibition and the purposes for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit earning capacity?
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> It is, as we have said, a question of fact. And it is quite clear that the purpose must be the I sole purpose. The paragraph says so in clear terms. If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. Per contra, if in truth the sole object is business promotion, the expenditure is not disqualified because the

nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act.

[7] Now, apply the proposition in that passage to the facts here. The appellant expended the monies in question for the sole object of promoting its business. At the end of the day, the dominant, if not the sole object or purpose of the customers' items is to promote the appellant's business. So it is not, and cannot be described as, entertainment within s 39(1)(l).

[8] But there is an equally firm ground on which the appellant's case stands. Indeed, the fact pattern presents a textbook illustration of what amounts to consideration in law. The consideration moving from the customer is the payment he makes while the consideration moving in the opposite direction is the appellant's product and a customers' item. To illustrate, if a customer pays RM10 to purchase a can of 'Castrol' engine oil he receives the can and a 'T' shirt. The RM10 is the consideration moving from the customer to the appellant. The consideration moving from the appellant to the customer is the can of engine oil and the 'T' shirt. That then is the bargain. And it matters not a jot that the shirt may not fit the customer or that he or she may throw it away.

[9] In *Chappell & Co Ltd v Nestle Co Ltd & Anor* [1960] AC 87 the plaintiffs owned the copyright in a song titled 'Rockin Shoes'. The defendants who were manufacturers of confectionery offered to the public by advertisement that any person who sent a shilling and six pence (1s 6d) to them accompanied by three wrappers of their sweet would receive a record of a reproduction of the song in question. The sum of 1s 6d was the price of the defendants' product and the cost of postage. The plaintiffs brought an action for infringement of their copyright in the song because they had received no royalty. They would only have been able to succeed if they could prove that some consideration had been received by the defendants in addition to the 1s 6d. They argued that the three wrappers accompanying the 1s 6d amounted to consideration. They succeeded. Lord Somervell said:

> The question, then, is whether the three wrappers were part of the consideration or, as Jenkins LJheld, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store. I think they are part of the consideration. They are so described in the offer. 'They,' the wrappers, 'will help you to get smash hit recordings.' They are so described in the record itself — 'all you have to do to get such new record is to send three wrappers from Nestle 's 6d. milk chocolate bars, together with postal order for 1s. 6d.' This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestle's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration.

[10] If the wrappers in *Chappell* amounted to consideration in law, I am unable to see why the customers' items in this case do not. I must add that the law on the

A subject has not been at a standstill and that there has been considerable movement since the decision in *Chappell*. It has now been accepted that even a practical advantage obtained by a promisor in a bargain is good consideration to support the promise: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's LR 526; *Lee v GEC Plessey Telecommunications* (1993) IRLR 383; *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723; *Silver v Dome Resources NL* [2007] NSWSC 455. But *Williams v Roffey Bros* has not gone without criticism (see *Halson* 106 LQR 183; *Andrew Phang* 107 LQR 21; *Adams & Brownsword* 53 MLR 536; *Chen-Wishart* 14 NZULR 270; *Hird & Blair* [1996] JBL 254) and I must say, for myself, that the full impact of that decision is yet to be felt. A time may come when its correctness may fall to be tested.

[11] But whether it is *Chappell v Nestle or Williams v Roffey Bros* you apply the result is the same in the present case. The first I have already discussed. But even if you apply the second, it is plain that a customer who purchases the appellant's product obtains a practical advantage when he or she receives a 'T' shirt or drinking mug as well. The shirt may be worn and the mug may serve several useful purposes thereby conferring a practical advantage upon the customer.

[12] Viewed from any perspective, the transactions in respect of the customers' items were plainly bargains made by the appellant for the sole purpose of business promotion and hence fall within the basket provision. The expenses incurred are not entertainment expenses within s 39(1)(l). The appellant was accordingly entitled to deduct them for the relevant years of assessment. Having come to the conclusion for the reasons already given, I find it unnecessary to deal with the other arguments raised by the appellant.

[13] The appeal is allowed. The orders in the High Court and the deciding order of the Special Commissioners are hereby set aside. The relevant assessments imposed on the appellant are hereby discharged. The costs in this court and in the court below must be borne by the respondent. The deposit in court shall be refunded to the appellant.

[14] My learned brothers, James Foong and Zulkefli JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Daphne Sebastian